

Office of the Presiding Officer
Military Commission

September 30, 2005

**SUBJECT: Presiding Officers Memorandum # 10 - 2, Presiding Officer
Determinations on Defense Witness Requests**

This POM supersedes POM #10-1, dated 20 September 2005.

1. This POM establishes the procedures for the defense to request that the Presiding Officer order the production of a witness on motions, the merits, sentencing, or otherwise, that has been denied by the Prosecution. While this POM does not stipulate the format *for an initial request to the Prosecution*, it is strongly recommended that counsel use the format below. By so doing, if the initial request is denied, the Presiding Officer may make an efficient and speedy decision on the matter to assist counsel in preparing their cases. Failure to provide the necessary information when making a request for a witness often leads to requests being initially denied by the prosecution solely because insufficient information was provided, which can produce needless inefficiency when a challenge to that decision is taken to the Presiding Officer.

2. A request, or noting that a particular witness is needed, in a motion or other filing is NOT a substitute for a witness request. If counsel are aware that a witness is necessary on a motion or other filing, not only should that be addressed in accordance with POM #4-3, but *the counsel is also required to file a request* in accordance with this POM.

3. Prosecution “denial” of defense requested witness.

a. If the defense requests, and the prosecution has denied, a defense witness request, the defense shall within 3 duty days of learning of the prosecution’s denial - or when there has been prosecution inaction on the request for 3 duty days - submit a “Request for Witness.” All the procedures of POM #4-3 shall apply to how this request is formatted, sent, the addressees, and responses and replies thereto except as otherwise provided in this POM (POM #10-2) and the contents of the request which is set forth in paragraph 3c below.

b. Each request shall be separate, and each request shall be forwarded by a separate email with the subject line: Witness Request - [Name of Witness] - US. v. [Name of Case].

c. The heading for the request (attachment) will be as provided at enclosure 1 to POM # 4-3. Each of the below items shall be in a separate, numbered paragraph:

(1) Paragraph 1: {Identity of witness and translator needs.} The name of the witness to include alias, mailing address, residence if different than mailing address,

telephone number, and email address. Also indicate the language and dialect the witness speaks (if not English) so translator services can be made available if necessary.

(2) Paragraph 2: {Synopsis of witness' testimony}. What the requester believes the witness will say. *Note:* Unnecessary litigation often occurs because the synopsis is insufficiently detailed or is cryptic. A well-written synopsis is prepared as though the witness were speaking (first person), and demonstrates both the testimony's relevance and that the witness has personal knowledge of the matter offered. *See* Enclosure 1 for some suggestions.

(3) Paragraph 3: Source of the requestor's knowledge about the synopsis. In other words, how does counsel know that the witness will testify as stated? For example, counsel might state, "On X September 2005, I interviewed the witness, and he personally provided the information in the synopsis."

(4) Paragraph 4: Proposed use of the testimony - motions (specify the motion), case-in-chief, rebuttal, sentencing, other.

(5) Paragraph 5: How and why the requestor believes the witness is reasonably available, and the date of the last communication with the witness and the form of that communication.

(6) Paragraph 6: Whether the requestor would agree to an alternative to live testimony (See listing below.) to present what is described in the synopsis to the Commission, or the reasons why such an alternative is NOT acceptable, citing to Commission Law. (*Note:* It is unnecessary to state that live testimony is better than an alternative so the Commission can personally observe a witness' demeanor. State here reasons *other than* that basis.)

- (a) Conclusive notice.
- (b) Stipulation of fact.
- (c) Stipulation of expected testimony.
- (d) Telephonic.
- (e) Audio-visual.
- (f) Video-taped interview.
- (g) Written statement.

(7) Paragraph 7: Whether any witness requested by the defense, or being called by the government, could testify to substantially the same matters as the requested witness.

(8) Paragraph 8: If the witness is to testify as an expert, the witness' qualifications to do so. This may be accomplished by attaching a *curriculum vitae* to the request. *See* paragraph 6, POM #4-3. This paragraph must also include a statement of law as to why the expert is necessary or allowable on the matter in question.

(9) Paragraph 9: Other matters necessary to resolution of the request.

4. Action by the prosecution upon receipt of a request.

a. Production of the witness. If the Prosecution and Defense agree that the witness should be produced, the prosecution need not prepare a response to the request. The prosecution should provide a copy of all approved witness requests and lists to the Chief Clerk for Military Commissions to facilitate provision of translator and court reporter services (the court reporters need to accurately spell names in transcripts).

b. Agreement to an alternative to live testimony. If the parties agree to an alternative to the live testimony of a witness in the form of a writing (*see* paragraph 3c(6)(a-g) above) the parties will immediately prepare the agreed upon writing. Once agreement has been reached on an alternative to live testimony and the writing or other matter to be used as an alternative, the prosecution shall notify the Presiding Officer and the Assistant that agreement has been reached, and provide a copy of the approved statement or stipulation to the Presiding Officer and the Assistant.

5. Action by the government upon receipt of a request - government does not agree. If the government will not produce the requested witness or if the government and defense cannot agree on an alternative to live testimony or the wording of any writing that would be used as a substitute, the government will prepare and file a response, using the procedures in POM #4-3, within 3 duty days of receiving the request. The prosecution shall address, by paragraph number, each assertion in the defense request to which the government does not agree or wishes to supplement.

6. Timing. Requests for witnesses, unless otherwise directed by the Presiding Officer, shall be made to the prosecution by the defense not later than 30 calendar days before the session in which the witness is first needed to testify. Failure to make requests in a timely manner may cause the witness request to be disapproved by the Presiding Officer, despite other factors which might appear to require the witness' presence.

7. Resolution by the Presiding Officer. In accordance with paragraph MCO #1, section 5H, the Presiding Officer will approve those witness requests to the extent the witness is necessary and reasonably available. The decision will be communicated to the prosecution and the defense.

Signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer

1 Enclosure
As stated

Enclosure 1 - POM 10

1. The drafting of an adequate synopsis is critical to resolve witness issues.
2. Paragraph 4c(2) of POM 10-1 states:

{Synopsis of witness' testimony}. What the requester believes the witness will say. Note: Unnecessary litigation often occurs because the synopsis is insufficiently detailed or is cryptic. A well-written synopsis is prepared as though the witness were speaking (first person), and demonstrates both the testimony's relevance and that the witness has personal knowledge of the matter offered.

3. A proper synopsis serves many purposes:

- a. It makes clear what the witness will say - not just the subject or topic of the witness's testimony.

- b. It describes how the witness is necessary and how the offered testimony is relevant. The parties may agree concerning what a witness will say, but that doesn't mean that the witness is necessary or the testimony relevant. (Relevant being shorthand here for the reasonable person standard in the President's order.)

- c. It permits a realistic opportunity to obtain a satisfactory alternative to the testimony. If the parties agree what a witness will say and that it is relevant, they may agree to a stipulation or other ways for the party to present the testimony. This could be a safeguard for a defense-requested witness who later becomes unavailable.

- d. It ensures that the Presiding Officer has sufficient facts to make a decision. The PO knows nothing about the case.

4. Here are several examples to clarify the type of information required for an adequate synopsis:

EX 1. The witness will testify he is an expert in the area of fingerprint comparisons and how those comparisons are performed.

Problem: We know what he will testify *about* or the *subject*, but we do not know what he will *say*, and how his testimony is *relevant*.

EX2. Same as EX 1 above, but adding: The witness will further testify that a latent print found at the alleged crime scene was not that of the defendant.

Problem: OK, I know what he will say, but how is that relevant?

EX3. Same as EX2 above, but adding: The fingerprint was in the purported victim's blood, and there is no evidence that other than one person killed the purported victim.
No Problem: Got it. I know what he will say, and I know how it is relevant to the case. This is something upon which a decision can be made.

Another example.

EX1. The witness will testify that he is an expert in Arabic.

Problem: What is the relevance?

EX2. The witness will testify that he is an expert in the XYZ dialect of Arabic.

Problem: Still don't know the relevance.

EX3. The witness will testify that he is an expert in the XYZ dialect of Arabic, that the accused before the Commission is an XYZ speaker, and that the Prosecution-offered translation of the accused's statement is incorrect.

No Problem: Got it!